and there need not be any further record of grounds of proof. A notice, however, had to be sent to the bailor as envisaged in section 404(1) and as exemplified in Form No. XLII in the second schedule to the Criminal Procedure Code.

I had asked the learned magistrate to give his grounds of decision for making the order that he did make. He has been very frank in admitting his mistake but has taken refuge under the shelter that the notice sent by him to the bailor was the only type of notice supplied to the court by the Government Printer meaning thereby that the court had not been supplied the forms in Form No. XLII. The blame cannot be shifted to the Government Printer. The duty is cast on the court and the non-supply of printed forms cannot be made an excuse for the non performance of a duty. It is hardly any reason for making the order which the law does not authorise until a proper notice had been served on the bailor as required by section 404. The required notice not having been issued the order of the learned magistrate cannot stand and I set aside the order which the learned magistrate had made requiring the bailor to pay the sum of fifty dollars. I understand that fifty dollars have been paid by the bailor to the court and that amount should be refunded to him.

Order set aside.

SHARIKAT K. M. BHD. v. THE DIRECTOR-GENERAL OF INLAND REVENUE

[O.C.J. (Gill F.J.) April 10, 1972]

[Muar — Originating Motion No. 8 of 1971]

Income Tax — Company general meeting expenses — Whether expenditure deductible from income — Premium in respect of tenancy — Whether income assessable to tax — Income Tax Act, 1967, ss. 4(d), 33, Sch. 5 para. 34.

This was an appeal by way of a case stated by the Special Commissioners of Income Tax, for the opinion of the court on the requisition of the appellant company.

The facts appear sufficiently from the judgment.

The questions of law for the opinion of the court were: (a) whether the general meeting expenses of $760 were an expenditure deductible from income so as to reduce the amount assessable to income tax; and (b) whether the sum of $2,500 received by the appellant company from its tenant in respect of the tenancy of one of the company's shop houses was income assessable to tax.

The Special Commissioners held, with regard to the first question, that the general meeting expenses of $760 were not deductible on the ground that they were not expenses wholly and exclusively incurred in the production of the gross income within the meaning of section 33 of the Income Tax Act, 1967. As regards the second question, it was held that the sum of $2,500 was a premium.

Held, dismissing the appeal: on a proper interpretation of section 33 of the Income Tax Act, 1967, question (a) must be answered in the negative, and on the true construction of section 4(d) of the Act, the answer to question (b) must be in the affirmative.

Cases referred to:-

(1) *Strong & Co. of Romsey, Ltd.* v. *Woodifield* 5 T.C. 215, 220.

(2) *Bombay Steam Navigation Co. (Pte.) Ltd.* v. *Commissioner of Income Tax* A.I.R. 1965 S.C. 1201, 1205.

(3) *Commissioner of Income Tax* v. *Kirkand Coal Co.* A.I.R. 1970 S.C. 1586.

(4) *Robert Addie & Sons' Collieries Ltd.* v. *Commissioners of Inland Revenue* 8 T.C. 671, 676.

(5) *Commissioner of Income Tax* v. *Rao Thakur Narayan Singh* 46 I.T.R. 901.

(6) *Regent Oil Co. Ltd.* v. *Strick* [1965] 3 All E.R. 174, 197.

INCOME TAX CASE STATED.

R. R. Chelvarajah (*Yew Hock Thye* with him) for the appellants.

Rahmat bin Haji Jamari (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Gill F.J.: This is an appeal under paragraph 34 of Schedule 5 of the Income Tax Act, 1967 by way of a case stated by the Special Commissioners of Income Tax for the opinion of this court on the requisition of the appellant company.

The facts as found by the Special Commissioners are fully stated in the case. They lie in a narrow compass. The sole business of the appellant company consists of letting out its five shop houses. By a letter dated February 9, 1969 one Mat Isa bin Wahab offered to rent one of its shop premises at No. 2 Jalan Aji Segamat. Similar offers were also received from other persons. The offers were discussed at a meeting of the company's board of directors on March 9, 1969. Eventually, the appellant company entered into a verbal agreement with Mat Isa whereby the premises were let out to him for a period of ten years from July 1, 1969 at a rental of $100 per month and a further payment of a lump sum of $2,500 which was duly paid before Mat Isa moved into the premises. This amount of $2,500 was returnable to Mat Isa only if the company took back the premises before the expiry of the said period of ten years.

Paragraph 3 of the case states that in connection with its annual general meeting in 1969, the company incurred the following expenses: —

(a) postage for sending out notices of general meeting - - - - - - - -	$100.00
(b) printing of notices of general meeting, minutes of previous meeting, directors' report and statement of account - -	$360.00
(c) cost of nasi briani for shareholders attending the general meeting - - - -	$300.00
	$760.00

The respondent treated the amount of $2,500 received by the company from Mat Isa in respect of the tenancy as premium and included this amount as its income when assessing the company's income tax for the year 1970, and he refused to allow the general meeting expenses of $760 to be deducted from the income. The company appealed to the Special Commissioners against the inclusion of the said amount of $2,500 and against the refusal to allow deduction of the said amount of $760.

The special commissioners heard the appeal in due course and on February 4, 1971 made a deciding order that the appeal be rejected but that the assess-

ment of income tax in respect of the appellant company for the year of assessment 1970 as *per* notice of assessment dated April 18, 1970 be amended so as to allow the deduction of a sum of $208 from its gross income as agreed between the appellant company and the Director-General of Inland Revenue.

The questions of law in the case stated for the opinion of this court are —

(a) whether the general meeting expenses were an expenditure deductible from income so as to reduce the amount assessable to income tax, and

(b) whether the sum of $2,500 received by the appellant company from its tenant in respect of the tenancy was income assessable to income tax.

As regards the first question, the special commissioners held that the general meeting expenses of $760 were not deductible on the ground that they were not expenses wholly and exclusively incurred in the production of the gross income within the meaning of section 33 of the Income Tax Act, 1967. In so holding they found support in the following words of Lord Davey in *Strong and Company of Romsey, Ltd.* v. *Woodifield*: [1]

"It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade or is made out of the profits of the trade. It must be made for the purpose of earning the profits."

It is argued on behalf of the appellant company before this court that as a company is required by law to hold an annual general meeting at which appointments of its various officers have to be made and many other matters have to be discussed and decisions taken thereon, without which the company cannot exist for long, in considering the expenses incidental to the holding of such a meeting a lenient and liberal approach should be made by the revenue authority. It is conceded that item (c) under paragraph 3 of the facts found by the commissioners was rightly disallowed. But it is contended that items (a) and (b) should be treated as outgoings and expenses wholly and exclusively incurred in the production of the gross income of the company.

It is further argued that in the light of the facts of the present case the *dictum* of Lord Davey in *Woodifield's* case[1] would appear to support the appellants' case, and reference is made to the *dictum* of the Lord Chancellor in the same case that expenses incidental to the trade must always be allowed as a deduction. The decision of the Supreme Court of India in *Bombay Steam Navigation Co. Private Ltd.* v. *Commissioner of Income tax*,[2] which was cited with approval in the case of *Commissioner of Income tax* v. *Kirkand Coal Co.*[3] decided by the same court, is also relied on for the same proposition.

In my judgment, none of the authorities relied on by counsel for the appellants supports his case. In the *Bombay Steamship Navigation Co.'s* case[2] it was held —

"Whether a particular expenditure is revenue expenditure incurred for the purpose of business must be determined on a consideration of all the facts and circumstances, and by the application of principles of commercial trading. The question must be viewed in the larger context of business necessity or expediency. If the outgoing or expenditure is so related to the carrying on or conduct of the business, that it may be regarded as an integral part of the profit earning process and not for acquisition of an asset or a right of a permanent character, the possession of which is a condition of the carrying on the business, the expenditure may be regarded as revenue expenditure."

In that case one of the questions that arose for consideration was whether interest paid by the assessee on the unpaid purchase price for acquiring the business was a capital expenditure within the meaning of section 10(2)(xv) of the Act. One of the arguments raised on behalf of the assessee in support of the contention that payment of interest was revenue expenditure for the purposes of business was that in the event of its failure to pay interest accruing due, the seller could enforce the lien and the business of the assessee company would come to an end, and that in any event the expenditure was necessary on the ground of business expediency and was incurred directly or indirectly to facilitate the carrying on of the business. While rejecting this argument their Lordships of the Supreme Court observed as follows (at page 1204):

"If the principal or the interest accruing due was not paid the Scindias had undoubtedly a right to enforce their lien against the assets of the assessee company's business, but that cannot be regarded as a ground for holding that the expenditure fell within section 10(2) (xv). Even in respect of a liability wholly unrelated to the business, it would be open to a creditor to sequester the assets of the assessee's business and such sequestration may result in stoppage of the operation of the business. Expenditure for satisfying liability unrelated to the business even if incurred for avoiding danger apprehended or real to the conduct of the business cannot be said to be revenue expenditure. Nor can it be said that because a liability has some relation to the business which is carried on, expenditure incurred for satisfaction of such liability is always to be regarded as falling within S. 10(2) (xv)."

It is to be observed that a similar argument is being put forward in the instant case. I must therefore reject it for the same reason.

In *Robert Addie & Sons' Collieries, Ltd.* v. *Commissioners of Inland Revenue*[4] the Lord President (Clyde) said:

".... no disbursement or expense can be deducted in ascertaining the amount of the company's profits or gains except it be 'money wholly and exclusively laid out or expended for the purposes of the trade'. What is 'money wholly and exclusively laid out for the purposes of the trade' is a question which must be determined upon the principles of ordinary commercial trading. It is necessary accordingly to attend to the true nature of the expenditure, and to ask one's self the question, is it a part of the company's worknig expenses? — is it expenditure laid out as part of the process of profit-earning? — or, on the other hand, is it a capital outlay? — is it expenditure necessary for the acquisition of property or of rights of a permanent character, the possession of which is a condition of carrying on its trade at all?"

His Lordship then went on to approve of the *dictum* of Lord Davey in *Woodifield's* case.[1] Bearing in mind what was said by the Lord President in the above case, it would seem clear that the expenses incidental to the holding of the annual general meeting were a part of the company's working expenses. Needless to add, they can by no stretch of imagination be regarded as an integral part of the profit earning process of the company. The first question therefore must be answered in the negative.

As regards the second question, the special commissioners held that the sum of $2,500 paid by Mat

Isa to the appellant company on his obtaining the tenancy of one of the company's shop houses was a premium, even though it was described as "bayaran goodwill pindah milik". It was argued before them that in the hands of the appellant company the money was a capital receipt, on the ground that it was payment for parting away of a right. The commissioners have stated in their grounds of decision that it was not made clear to them in the argument what right the appellant company was alleged to have parted with, and they go on to state that if "parting away of a right" meant that the appellant company had given rights under the tenancy to Mat Isa and that the payment was in consideration of the giving away of those rights under the tenancy, then in their opinion the payment could not be anything but a premium, so that it was assessable to income tax under section 4(d) of the Income Tax Act, 1967.

It is argued on behalf of the appellant company in this court that the sum of $2,500 was not a premium because the payment was a conditional payment and not an outright payment, there being a proviso in the tenancy agreement for its return if the appellant company took back the premises before the expiry of the period of ten years for which the tenancy was given. In this connection, reference is made to the following definition of "premium" in *Pinson's* Revenue Law, Fourth Edition, at page 133:

"The term 'premium' is defined to include any like sum, whether payable to the immediate or a superior landlord; and any sum (other than rent) paid on or in connection with the granting of a tenancy is presumed to have been paid by way of premium except in so far as other sufficient consideration for the payment is shown to have been given."

And it is submitted that the proviso for the return of the money comes within the exception mentioned in that definition. I must confess that I cannot see how it can possibly come within that exception, there being no sufficient consideration other than the granting of the tenancy itself.

It is next argued that giving a lease for ten years is like parting away with an interest in the land, so that it must be treated as a capital payment. In this connection, reference is made to *Srinivasan* on Income Tax Law, Vol. IV, (Supplement), at page 33, which mentions the case of *Commissioner of Income Tax* v. *Rao Thakur Narayan Singh*[5] in which it was held:

"The principle laid down by the Supreme Court is that if the payment is made first and the relationship of landlord and tenant comes into existence subsequently and the payment is for parting with certain rights possessed by the landlord the payment amounts to a capital payment and not a revenue payment."

A short answer to this argument is that the case cited has no bearing on the present case because here the payment was not made first and the relationship of landlord and tenant created subsequently. It is also to be observed that the statement of the law in the case cited speaks of "a capital payment" which can only mean payment made by the person on whom the obligation to pay under the tenancy agreement must fall, namely, the tenant. But it is not the tenant with whom we are concerned in this case. The question here is whether the landlord is liable to pay income tax on the premium which he receives. It therefore follows that that case also does not support the appellant.

There can be no doubt that the sum of $2,500 paid by Mat Isa to the company was a premium. It is the reality of the payment that matters, and not any disguise or label with which it may be provided. As Lord Upjohn said in *Regent Oil Co., Ltd.* v. *Strick*: [6]

"There is no magic in the use of the word 'premium'; it merely means a lump sum paid as a consideration for the acquisition of the lease."

(in the present case a long-term tenancy). His Lordship went on to say that if it is a premium, it is capital; if it is rent or royalty, it is an outgoing deductible for the purposes of tax. It is to be observed that his Lordship was speaking of the premium or the rent or royalty paid by the tenant. Needless to say, a premium has to be looked at from the standpoint of the tenant as well as that of the landlord. For the tenant it is a capital outlay which is not deductible for the purpose of tax. For the landlord it is in the nature of a profit which is made liable to income tax, in the same way as any rent received by him, under section 4(d) of the Income Tax Act, 1967. As I have already said, we are not concerned in this case with Mat Isa in whose case the sum of $2,500 was an outgoing in the nature of a capital outlay. What we are concerned with is whether the receipt of that money by the company is capital or income for tax purposes. Insofar as the company is concerned, I cannot see why it should be treated as anything but income for tax purposes. In any event, it is declared to be so by section 4(d) of the Act, to which reference has been made earlier.

Lastly, it is argued that even if the payment made is to be treated as a premium it was a premium for a period of ten years, so that if it attracts tax, such tax should be spread out over a period of ten years. Alternatively, it is suggested that the condition that the payment of $2,500 is returnable means that the sum paid does not crystallize into a premium until the expiry of the period of ten years. It is further said that it is unfair to the company to have to pay tax on the sum of $2,500 now and then be faced with a situation where it has to be returned, even though the revenue authority in that event may consider it reasonable to refund the tax charged.

In my judgment there is no substance in any of these arguments. The company has been paid this sum of $2,500 which cannot but be treated as a premium. The fact that the company may have to refund this amount in the event of termination of the tenancy before the expiry of the period of ten years is beside the point. It may well be that in the event of the appellant company having to return this sum of $2,500 it may become entitled to a refund of the tax paid. But it is not for this court to go into the question of what may happen in the future. So long as the premium has been received by the company, it is liable to income tax under section 4(d) of the Act, so that the special commissioners were right in making their deciding order to that effect. The second question therefore must be answered in the affirmative.

In the result, I am of the opinion that on a proper interpretation of section 33 of the Income Tax Act, 1967, question (a) must be answered in the negative, and that on the true construction of section 4(d) of the Act, the answer to question (b) must be in the affirmative. That being so, the appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitors: *R. R. Chelvarajah & Co.*

PALANIAPPAN v. RAMANATHAN & ORS.

[O.C.J. (Abdul Hamid J.) April 13, 1972]

[Kuala Lumpur — Civil Suit No. 744 of 1971]

Practice and Procedure — Costs — Stay of action until costs of previous suit paid — Security for costs — R.S.C. 1957, O. 65, r. 6A.

Practice and Procedure — Action — Whether dismissal of previous action for want of prosecution a bar to fresh action.

This was an application by the defendants (a) to stay all further proceedings in the suit until the plaintiff provided security for costs in the sum of $3,500 and had paid the first defendant all costs due and outstanding from him in Civil Suit No. 1138 of 1966 in the High Court at Kuala Lumpur and the appeal therefrom; and (b) that the suit be struck out on the grounds that it was frivolous and/or vexatious and/or was an abuse of the process of the court. It was the applicant's contention that Civil Suit No. 1138 of 1966 was substantially the same as the present action. It was disclosed that the plaintiff took no action to proceed with the matter and in February 1971 the defendants applied to have the suit dismissed for want of prosecution. The plaintiff made no objection and an order was accordingly made on March 22, 1971.

The court had to consider, primarily, whether the present action should or should not be stayed until costs of the previous suit have been paid and whether an order requiring the plaintiff to provide security for costs should also be made.

Held: (1) the effect of the dismissal of the previous action for want of prosecution did not bar the plaintiff from instituting a fresh action.

(2) the principle that where the plaintiff having failed in one action commences a second action for the same matter, the second action must be stayed until the costs of the first action had been paid, equally applies to a case where there is a dismissal of action for want of prosecution, provided the second action is substantially for the same matter;

(3) this was a proper case for an order that the plaintiff should provide security for costs.

Cases referred to:-

(1) *Martin* v. *Earl Beauchamp* (1884) 25 Ch. D. 12.

(2) *James M'cabe* v. *The Governor and Company of the Bank of Ireland* (1889) 14 App. Cas. 413.

APPLICATION.

M. Shankar for the applicants/defendants.

S. A. Raj for the respondent/plaintiff.

Abdul Hamid J.: This is an application by the defendants that —

(a) All further proceedings in this suit be stayed until the plaintiff provides security for costs in the sum of $3,500 and has paid the first defendant all costs due and outstanding from him to the first defendant in civil suit No. 1138 of 1966 in the High Court at Kuala Lumpur and the appeal therefrom; and

(b) Upon providing such security and payment of the costs aforesaid this summons-in-chambers be restored for hearing the application for an order that this suit be struck out on the grounds that it is frivolous and/or vexatious and/or is an abuse of the process of this court.

It is the applicants' contention that civil suit No. 1138/1966 (hereinafter referred to as "the previous suit") is substantially the same as the present action.

In the previous suit, the plaintiff/respondent claimed that as adoptive son of Valliappa Chettiar and by reason of the adoption, he is one of the beneficiaries of the estate of the deceased. Referring to the appointment of the first defendant/applicant as executor and trustee on February 20, 1961, the plaintiff questioned the validity of the purported will in respect of which the first defendant was so appointed. The plaintiff further raised the issue as to his interest as beneficiary of the deceased's estate by reason of the adoption deed of June 7, 1962. He also alleged that the first defendant refused to hand over the estate to him. The other allegations relate to the power of the first defendant as executor and trustee to sell the property of the estate, the first defendant's careless and reckless handling of the estate in particular the sale of two rubber estates in Rawang, the attempt to sell similar properties in India, the attempt to sell below market value the properties in Kuala Lumpur and the closure of the moneylending business of the said estate. The plaintiff prayed that —

(a) a receiver for the estate of RM.P.RM.P. Valliappa Chettiar, deceased be appointed;

(b) the said defendant do forthwith hand over to the said receiver the entire movable and immovable properties of the estate of the said deceased and/or that the said receiver shall forthwith take over the entire possession and control of the said estate and shall be responsible for the preservation and management of the said estate pending the decision of the court in India in respect of the validity or otherwise of the will purported to have been executed by the said deceased;

(c) such receiver upon such decision by the court shall apply to this court for directions as regards the distribution of the estate of the said deceased;

(d) that such receiver shall produce or cause to be produced to this court a complete statement of affairs and accounts of the estate of the said deceased and such periodical accounts as may be directed by the court; and

(e) pending the appointment and taking over the possession of the estate of the said deceased an injunction to restrain the defendant or his agent or servant from disposing of or otherwise dealing with the estate of the said deceased.

With reference to the previous suit, it is disclosed that the plaintiff took no action to proceed with the matter and in February, 1971 the defendant applied to have the suit dismissed for want of prosecution. The plaintiff made no objection and an order was made on March 22, 1971 dismissing the action for want of prosecution.

In the present suit, the plaintiff sued in addition to the first defendant, also in the capacity as executor